Response by Energia to SEM-21-026 and SEM-21-027

Consultation on Dispatch, Redispatch and Compensation Pursuant to Regulation (EU) 2019/943

and

Proposed Decision on Treatment of New Renewable Units in the SEM

09 July 2021

Executive Summary

Energia is committed to playing its part in delivering Europe and Ireland's 2030 emissions reduction and renewable energy targets at the lowest cost to the end consumer, just as the Regulatory Authorities are. However, we are concerned that the proposals in SEM-21-026 and SEM-21-027 (collectively, "the Consultation Papers"), if implemented, will significantly adversely impact on the ability of the industry to deliver the required investment to enable Ireland to achieve its 2030 targets. Furthermore, the Consultation Papers allocate risk to generators that is impossible for them to manage, meaning that the cost to consumers of developing further renewable capacity will be significantly greater than is necessary.

Regulation (EU) 2019/943 (the "Regulation") creates the binding legislative framework for facilitating the necessary levels of investment in renewable generation, networks, demand response, storage and cross zonal capacity at least cost to consumers. Implementation of the Regulation is not a matter in respect of which the Regulatory Authorities have a discretion, and we would urge the Regulatory Authorities to implement the Regulation strictly in accordance with its terms.

Below is a summary of the key points made in this response:

1. By virtue of regulation 2019/943 Europe has set a clear strategy to attract renewable electricity investment and not to delay or diminish this investment on the basis of regulatory or technical barriers – e.g., the ability of the grid to accommodate the volume of renewable electricity required to meet the 2030/50 climate targets.
2. The intention of the Regulation is clear and is summarised in Recital 4 as follows: "This Regulation establishes rules to ensure the functioning of the internal market for electricity and includes requirements related to the development of renewable forms of energy and environmental policy". The requirements in relation to development of renewable forms of energy include removal of regulatory and technical barriers, including by incentivising the development of grid, storage, demand response and cross zonal capacity to ensure that the further deployment of renewable electricity generation is both promoted and facilitated.
3. The risks and incentives, primarily those related to network constraints, curtailment, and firm access, need to be allocated to the parties best able to manage those risks. And the parties most capable of managing those risks are not renewable developers.
4. Compensation for dispatch down is required by law under the Clean Energy Package (CEP). The legal requirements of the CEP must be implemented in full, specifically the right of all qualifying generation to compensation at the level of financial support for downwards redispatch.
5. It is the responsibility of the Regulatory Authorities to strictly implement the requirements of Articles 12 and 13, and to do so as soon as possible.
6. The overall cost to consumers is not referred to in Article 13(7), nor are any of the other matters to which the RAs have had regard. It is therefore clear that "unjustifiably low" or "unjustifiably high" do not and could not pertain to a burden on consumers; and any considerations in relation to the characteristics of the SEM or

the financial support are irrelevant considerations, and it is unlawful to have regard to them.

7. The compensation must be available irrespective of the nature of the financial support (whether ROCs, REFIT, RESS or CPPAs).

8. While it is open to the Regulatory Authorities to incentivise generators to give up priority dispatch, they cannot do so by denying priority dispatch generators the level of remuneration to which they are entitled.

9. Constraints for non-priority plant cannot be construed as being compensated on a market-based basis if such plants are subject to the BCOP or the BMPCOP. Constraints should therefore be treated as non-market based redispatch, in line with the provisions of Article 13(3), and must be applied on a pro–rata basis regardless of dispatch priority for renewable units.

10. The EU's Clean Energy Package is intended to facilitate the achievement of Europe's 2030 targets and longer-term decarbonisation objectives, and it is important to acknowledge that this will require fundamental change which comes with a cost. The Clean Energy Package expressly acknowledges that it is not realistic to expect that the necessary investments in renewables will be made if renewables face redispatch risk that is not fully compensated.

11. As a direct consequence of a proposed departure by the Regulatory Authorities from the express legal requirements of Regulation (EU) 2019/943, the proposals set out in SEM-21-026 would only serve to increase cost for consumers and threaten Ireland's climate ambitions. To this end, consistent with WEI, we would urge the SEMC to reconsider the proposed interpretation of Regulation (EU) 2019/943 in the Consultation Papers.

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1 Introduction

Energia welcomes the opportunity to respond to Consultation Paper SEM-21-026 on 'Dispatch, Redispatch and Compensation Pursuant to Regulation (EU) 2019/943' and Proposed Decision SEM-21-027 on 'Treatment of New Renewable Units in the SEM' (collectively, "the Consultation Papers").

The remainder of this response is structured as follows. Section 2 considers the purpose of the Clean Energy Package and the status of the Regulation. Section 3 sets out our response to key points in the Consultation Papers. Sections 4 and 5 discuss the correct interpretation of Articles 12 and 13 in more detail. Section 6 briefly concludes and highlights the ned for urgent implementation of the Regulation. 6

Within this document there are references to the WEI response to the Consultation Papers, specifically on the correct legal interpretation of Article 13(7). It should be noted that Energia endorses the WEI response, which is representative of our views.

Regulation (EU) 2019/943 creates the binding legislative framework for facilitating the necessary levels of investment at least cost to consumers. The proposals set out in SEM-21-026, which would only serve to increase cost for consumers and threaten Ireland's climate ambitions are, in our view, a direct consequence of a proposed departure by the Regulatory Authorities from the express legal requirements of Regulation (EU) 2019/943. To this end, consistent with WEI, we would urge the SEMC to reconsider the proposed interpretation of Regulation (EU) 2019/943 in the Consultation papers.

2 High level observations on the Clean Energy Package and the Regulation

Before responding to the detailed elements of the Consultation Papers, we believe that it is of value to reflect on the purpose of the Clean Energy Package, and the Regulation in particular. Without a clear understanding of the purpose of the Regulation, it is easy to misconstrue the intent of individual articles. Conversely, when the objectives of the Clean Energy Package and the Regulation are understood, the intent of individual provisions are clear.

2.1 Objective of the Clean Energy Package

The overriding purpose of the Clean Energy Package is evident from the name. It is designed to create the legislative framework to transform the European energy sector over the remainder of the decade with a view to Europe being net zero by 2050. In order for Europe to achieve net zero by 2050, the power sector needs to be essentially decarbonised by 2040, less than 20 years away[1]. The Clean Energy Package recognises that Europe's decarbonisation agenda cannot be achieved without fundamental changes to the European power system and power markets. Any suggestion that the Clean Energy Package objectives can be realised without fundamental change are entirely unrealistic.

[1] European Parliament: https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/631047/IPOL_BRI(2019)631047_EN.pdf

At page 28 of SEM-21-026, the RAs indicate that they do not believe it is appropriate to compensate priority dispatch units on a different basis to the compensation arrangements in place today. However, the suggestion that the approach to compensation of curtailment in SEM-13-010 is appropriate today is equally unrealistic. This was developed in an entirely different context, against the background of significantly less ambitious decarbonisation measures and, most importantly, in the context of a different legislative regime. This is not a view the RAs are legally entitled to take. The compensation arrangements in place today were determined by the RAs a number of years ago prior to the Electricity Regulation coming into force. Now that the Regulation is in force, those arrangements are binding upon Ireland. The RAs do not have a discretion as to whether the current arrangements or the arrangements in Article 13(7) apply. To the extent that the compensation arrangements in place today are inconsistent with EU Law, EU Law must take precedence.

The Clean Energy Package expressly acknowledges that it is not realistic to expect that the necessary investments in renewables will be made if renewables face redispatch risk that is not fully compensated. It is similarly unrealistic to expect that necessary investments will be made in transmission, distribution, storage, demand response and cross zonal capacity without appropriate signals for future investment. This was expressly recognised by the European Commission when publishing the Clean Energy Package stating that: "*The Clean energy for all Europeans package sets the right balance between making decisions at EU, national, and local level. Member States will continue to choose their own energy mix, but must meet new commitments to improve energy efficiency and the take-up of renewables in that mix by 2030. For example, the new rules on the electricity market, which have been adopted today, will make it easier for renewable energy to be integrated into the grid, encourage more inter-connections and cross-border trade, and ensure that the market provides reliable signals for future investment*."[2] Facilitating integration of renewables and ensuring that reliable signals are provided for investment in grid, interconnection, storage and demand response are at the heart of the Clean Energy Package and the Regulation must be understood in this context.

The challenges of achieving the decarbonisation objectives of the Clean Energy Package are well understood, with the European Commission acknowledging that "*Constantly adding higher volumes of variable renewables is a challenge for systems. The new laws will increase our security of supply and flexibility by helping integrate renewables into the grid and manage risks, and by improving cross-border cooperation: this will lead to a cleaner, more stable and more competitive electricity sector across Europe*.[3]

Against this background, Recital 4 of the Regulation sets out the purpose of the Regulation as follows: "*This Regulation establishes rules to ensure the functioning of the internal market for electricity and includes requirements related to the development of renewable forms of energy and environmental policy, in particular specific rules for certain types of renewable power-generating facilities, concerning balancing responsibility, dispatch and redispatching, as well as a threshold for CO2 emissions of*

[2] https://ec.europa.eu/info/news/clean-energy-all-europeans-package-completed-good-consumers-good-growth-and-jobs-and-good-planet-2019-may-22_en

[3] Clean Energy for all Europeans, European Commission, March 2019

new generation capacity where such capacity is subject to temporary measures to ensure the necessary level of resource adequacy, namely, capacity mechanisms."

2.2 Status of the Regulation

We feel it is important to note at the outset that the proper interpretation of Articles 12 and 13 of the Regulation is not a matter in respect of which the Regulatory Authorities have a discretion. All three consultation papers published by the Regulatory Authorities have approached the question of the proper interpretation of Articles 12 and 13 as though it was a matter in respect of which the Regulatory Authorities have discretion. The Consultation Papers expressly refer to matters to which the Regulatory Authorities intend to have regard in making their decisions. However, the interpretation of Articles 12 and 13 is not a matter in respect of which the Regulatory Authorities have a discretion. The only thing that they can have regard to is the law.

It is clear from the views expressed by the Regulatory Authorities in the Consultation Papers that they do not agree with the views of the European Parliament and Council, in relation to levels of compensation required to be paid in the event of non-market based redispatch. However, the fact that the Regulatory Authorities may have made a different policy decision to that reflected in the Regulation is not a matter to which the Regulatory Authorities can have regard. The Regulatory Authorities are bound to implement the Regulation whether they agree with it or not.

A Regulation is legally binding and is not a matter in respect of which the SEMC has a discretion. Any time that the SEMC mentions a consideration that it is taking into account to determine the level of compensation that generators will receive, it is acting in breach of law because this is not a matter in respect of which it has a discretion. The European Parliament and Council has decided that firm generators should be compensated for non-market based redispatch. This is a minimum requirement of the Regulation and is critical to establish because it removes from the debate the question of whether the Regulatory Authorities are entitled to take into account considerations such as consumer protection in making decisions on Article 13(7).

An EU Regulation has general application to Member States, is binding in its entirety and is directly applicable without the need for any national implementing legislation, meaning that it can be relied on in a national court, and its provisions will override any inconsistent national law. At page 28 of SEM-21-026, the RAs indicate that they do not believe it is appropriate to compensate priority dispatch units on a different basis to the compensation arrangements in place today. However, this is simply not a view the RAs are legally entitled to take. The compensation arrangements in place today were determined by the RAs a number of years ago prior to the Electricity Regulation coming into force. Now that the Regulation is in force, those arrangements are binding upon Ireland and Northern Ireland[4]. The RAs do not have a discretion as to whether the current arrangements or the arrangements in Article 13(7) apply. To the extent that the compensation arrangements in place today are inconsistent with EU Law, EU Law must take precedence.

[4] The Electricity Regulation applies in the UK in respect of Northern Ireland pursuant to the EU-UK Withdrawal Agreement (Article 6 of the Withdrawal Agreement), and the Ireland/Northern Ireland Protocol (Article 9 and Annex 4).

The strict implementation of an EU Regulation is therefore not something in respect of which a Member State (or any emanation thereof, including the RAs) has any discretion, unlike a Directive, which allows the Member States freedom to choose how to fulfil the required objectives. The Regulation must be implemented strictly in accordance with its terms. For example, SEM-21-026 refers (at page 37) to Recital 2 of the Regulation which notes that an aim of the Energy Union is to provide final customers with safe, secure, sustainable, competitive and affordable energy. While it is clear that where the RAs are exercising a discretion, they are obliged to have regard to consumer protection, the interpretation of Article 13(7) provides the RAs with very little ability to exercise a discretion. Article 13(7) contains an objective requirement rather than discretionary power. As such, any regard that the RAs have to other provisions of the Regulation in deciding whether or not to implement Article 13(7) involves the RAs acting ultra vires by purporting to exercise a power that they do not have.

It is clear from SEM-21-026 that the SEMC have had regard to a range of policy considerations and obligations under domestic law in proposing its implementation of Article 13(7). This gives primacy to domestic law over an EU Regulation and is not permissible. While it is true that SEMC has duties in relation to the discharge of its statutory functions, any such duties are subservient to the provisions of Article 13(7). The RAs are bound by the Regulation in accordance with its terms and must implement it strictly. That the RAs have had regard to domestic statutory duties in interpreting an EU Regulation is a breach of both the Regulation and Article 288 of the TFEU.

Energia would be grateful if the Regulatory Authorities could ensure that when making a final decision on the proper interpretation of the Regulation, if evidence is advanced by respondents that does not accord with the Regulatory Authorities views that the Regulatory Authorities address such evidence directly and provide clear reasons as to why the respondent's interpretation of the law is incorrect, as opposed to whether the Regulatory Authorities disagree with the requirements of the Regulation.

3 High Level Observations on the Consultation Papers

We are concerned that the Consultation Papers do not appear to engage in any meaningful way with much of the content of the responses from Energia, other market participants, and IWEA on the previous consultation on the Regulation. The views of respondents were, for the most part, consistent and backed by compelling legal, policy and economic argument in relation to the intent and proper interpretation of the Regulation. The respondents, including IWEA, presented compelling evidence of the legislative background to the Regulation, the policy intention of the Commission and the practice in other jurisdictions. While much of this evidence is summarised in the Consultation Papers, it has not been engaged with in proposed decisions or minded to positions in any meaningful way in the more recent Consultation Papers. Rather, the Regulatory Authorities appears to have selectively latched on to views that accord with their own, while not explaining why they are comfortable dismissing the evidence that has been presented to them by respondents.

Before commenting on the correct interpretation of Articles 12 and 13 and the specific questions in the Consultation Papers, we have set out below some responses on key points in the Consultation Papers.

3.1 TSO Incentivisation

The Regulatory Authorities make the point in the Consultation Papers that TSO incentivisation "*is the responsibility of each RA in relation to the jurisdictional SONI and EirGrid price controls*". TSO incentivisation may not be "*the subject of this paper*", but it is at the heart of the Clean Energy Package and Article 13(7) of the Regulation in particular. The Regulatory Authorities therefore cannot take the view that TSO incentivisation is out of scope and therefore can disregard their responsibilities to implement Article 13(7) in a manner that appropriately incentivises investment in transmission, demand response, storage and cross zonal capacity. The definition of 'SEM Matter" under domestic law cannot absolve the Regulatory Authorities of their responsibility to implement Article 13(7) in accordance with its terms.

The importance of appropriate levels of compensation for redispatch to ensuring necessary investments in transmission, demand response, storage and cross zonal capacity was described by the European Commission[5] as follows: "*In principle, market-based resources should be used first, thus curtailing or redispatching first those generators which offer to do this against market-based compensation. In a second step, where no market-based resources can be used, minimum rules on compensation are foreseen, ensuring compensation based on additional costs or (where this is higher) a high percentage[6] of lost revenues. It would mean that network operators would obtain a clear incentive to make an assessment on the basis of costs as to the alternatives available to them to address the underlying network constraints, thereby creating opportunities for more innovative solutions such as storage. The increase in transparency and legal certainty would notably also prevent discrimination against certain technologies (particularly RES E) in curtailment and redispatch decisions.*" (emphasis added)

3.2 Improvement of Financial Situation of Existing Generators

The Consultation Paper states that "*It is clearly not the Regulation's intention to improve the financial situation of units where investments have already been made, but to encourage longer term investment signals for renewables.*" While there is a simplistic appeal to this statement it is important that this be contextualised.

First, no distinction is made between existing and new generators in the Regulation. This is therefore not a matter in respect of which the Regulatory Authorities have a discretion in the implementation of Article 13(7). As a strict matter of law, it is not open to the Regulatory Authorities to discriminate between existing and new investments in the manner proposed.

Second, the Regulation is utterly silent on the question of improvement or dis-improvement of the financial situation of investments that have already been made. As is noted above, the Regulation is not only concerned with, but expressly requires, that all redispatch is market based, save in limited circumstances, and that all generators are adequately compensated if they are subject to non-market based

[5] Commission Staff Working Document Impact Assessment accompanying the document, inter alia, Proposal for a Regulation of the European Parliament and of the Council on the electricity market (recast) SWD(2016) 410 final (Part 3 of 5)

[6] Note that Regulation as enacted the percentage of lost revenues that is required to be compensated is 100%.

redispatch. If implementing market based Redispatch or compensating generators adequately for non-market based Redispatch does improve the situation of existing generators, then that is absolutely intended by the Regulation, and is not only the intention of the Regulation, but is the express requirement. This decision to compensate renewables for redispatch was made by the European Parliament and Council and the Regulatory Authorities cannot depart from that.

Third, it is important to contextualise this concern. Renewable generators on the island of Ireland face a level of redispatch that is higher than most other jurisdictions in Europe and is considered unacceptable by the European Parliament and Council having regard to the permitted level of redispatch in Article 13(5). Any improvement of financial situation is therefore starting from a position that we know from Article 13(5) is considered unacceptable at the outset. Furthermore, generators in other jurisdictions where redispatch levels are high are often compensated for the full opportunity cost of Redispatch. This has been described by Wind Europe as follows:

"*Today, there is no uniformity on how redispatch is implemented across Europe. While market-based redispatch is the default option from the CEP, non-market-based mechanisms are still applied in many countries. In some Member States like Germany, curtailment compensation follows a cost-based approach so that wind farm operators receive the same income as if they would have been dispatched. Other countries like Ireland provide no or limited compensation for renewables' curtailment. Countries that have managed to integrate wind in the balancing market and have access to large flexibility sources (e.g. hydropower) present very low curtailment rates (e.g. Spain, Portugal, Denmark, Italy). Meanwhile, curtailment remains a key challenge in Germany and Ireland. Other countries with low shares of wind such as France and Poland do not currently face curtailment issues.*"[7]

The situation faced by generators in Ireland and Northern Ireland of high redispatch and limited or no compensation is therefore exceedingly rare in a European context. It is unsustainable to suggest that the plain intention of the Regulation to provide the regulatory framework to underpin Europe's decarbonisation objectives could be overridden by a national regulatory authority simply because a small subset of generators may have their financial position improved.

Fourth, given that compensation is designed to put the generator in the position that it would be in if it was not constrained or curtailed. This should not therefore be viewed as improving a generator's position. It simply puts the generator in the position where it is indifferent to the inability of the system to accommodate its generation.

Fifth, when considering whether the financial position of generators has improved, it is important to do so not by reference to the financial position of the generator today, but by reference to the financial position of the generator at the time the investment was made or (if earlier) at the time that the assumptions in relation to constraints and curtailment were made in the design of the relevant renewable support scheme. All investment decisions for generators that are now out of renewable support were made at a time when generators would have assumed limited or no constraints or curtailment. When the Irish Authorities notified REFIT 1 to the European Authorities, an average capacity factor for large and small wind of 35% was assumed with no

[7] https://windeurope.org/newsroom/news/how-to-operate-wind-farms-under-the-clean-energy-package-rules/

reference to constraints or curtailment. The remuneration for REFIT1 projects since that date have therefore been based on that assumption. Similarly, when REFIT2 was notified to the European Authorities, it assumed an average capacity factor of 31% based on actual historic levels of constraint and curtailment prior to 2011 and therefore remuneration since that date has been based on that assumption. Compensating such generators for unanticipated redispatch will therefore only improve their financial situation to the extent that it has disimproved in the interim.

Many financed projects have experienced substantially higher than forecast dispatch losses, and if this continues without Article 13 compensation a considerable number are likely to get into difficulties with their lenders.

Decisions with regard to compensation for constraints and curtailment should therefore not be seen as improving the financial situation of existing investors where they have already invested on the basis of an existing investment landscape and are viewed as having already contributed to the decarbonisation agenda, especially given that existing generators would not have been in a position to anticipate the levels of constraint and curtailment that they may face in future (for example in a 2030 environment with an additional 12GW of installed capacity targeted). Existing investments were not made on the basis or expectation that dispatch down levels would be as high as they are today >12% in 2020 or on the basis of going to 70% renewable penetration by 2030. Furthermore, investments were made at different times, by different developers and on the basis of different assumptions. It is not only inappropriate for the Regulatory Authorities to attempt to do this, they cannot possibly know the basis on which investment decision were made and so, even if it was lawful, it would be entirely unreasonable for the Regulatory Authorities to make a single decision that they would apply generally to every generator in circumstances in which all generators would be different and the Regulatory Authorities have no actual knowledge on which to base their decision.

Finally, it is important to note that if and to the extent that any existing generator will have its financial position improved as a consequence of providing adequate compensation, it is only because the levels of Redispatch faced by generators in Ireland and Northern Ireland are unacceptably high by reference to the levels prescribed in Article 13(5) and generators have not been adequately compensated for Redispatch. Had Irish and Northern Irish generators not faced such high levels of redispatch or been compensated as has been required by law since the Regulation took effect on 1 January 2020 (and as could have been anticipated for many years previously), this issue would not arise. The longer that the Regulatory Authorities wait before implementing the requirements of the Regulation, the greater the potential risk of perceived overcompensation.

3.3 Reducing the cost to end consumers

The Regulatory Authorities state in the Consultation Paper that "*While a number of respondents noted that the cost to consumers of implementing Article 13 should not be a relevant consideration for the SEM Committee, Recital 2 of the Regulation notes that "'[T]he Energy Union aims to provide final customers – household and business – with safe, secure, sustainable, competitive and affordable energy". In the RAs' view, the Regulation is cognisant that the cost to end consumers should be considered as part of its implementation.*"

There are a number of points that need to be made in relation to this statement:

First, as is noted above, Article 13 is binding and is not a matter in respect of which the Regulatory Authorities have a discretion. The use of the phrase "relevant consideration" in this paragraph betrays a fundamental misunderstanding by the Regulatory Authorities of the status of a Regulation. Having regard to "*relevant considerations*" in implementing a Regulation which affords no discretion on its face is impermissible. While it is true that SEMC has duties in relation to the discharge of its statutory functions, any such duties are subservient to the provisions of Article 13(7). The RAs are bound by the Regulation in accordance with its terms and must implement it strictly. That the RAs have had regard to domestic statutory duties in interpreting an EU Regulation is a breach of both the Regulation and Article 288 of the TFEU. The following points are without prejudice to this fundamental issue.

Second, it is important to contextualise the reliance that the Regulatory Authorities are placing on Recital 2 of the Regulation referred to above. The Regulation is concerned with creating the regulatory environment for achieving Europe's decarbonisation objectives. There are various references to customers in the Regulation but these relate primarily to opportunities for customers' increased participation in the market. There is a single reference to affordability in Recital 2 of the Regulation relating to the objectives of the Energy Union, and the focus of Recital 2 is on achieving affordable energy through the removal of barriers to the markets functioning consistent with the intent of Article 13(7) of protecting the market against the impact of system issues. At no point does the Regulation reference the overall cost that implementation of the Regulation may impose on final customers, nor that this is a relevant consideration for Member States. It is also notable that Article 6(10) allows for an exemption to Article 6(9) in circumstances where "the positive effects in terms of lowering of costs for final customers exceed the negative impacts on the market". No such provision has been included in Article 13.

Third, it is clear that compensating generators for redispatch does not make electricity any more unaffordable for consumers. In the short term, there may be no material difference as the cost is essentially reallocated rather than added. In this regard the European Commission observe that "*Ensuring sufficient compensation for curtailment, notably for RES E, will increase costs to be borne by system operators. In so far as these costs are currently integrated into renewable subsidy schemes, total system costs will however remain similar*".[8] However, in the long run the payment of compensation sends clear price signals for new investment which bring efficiencies to the market and benefits for consumers in the long run, which is in fact precisely the point made by Recital 2 of the Regulation.

Fourth, it is important to acknowledge that the implementation of the Clean Energy package and transformation of the entire European energy system does not come at no cost. Rather, there will be a very significant cost associated with this. The European Commission stated when publishing the Clean Energy package that: "*Over the next decade, Europe will need around €180 billion a year in investments to improve energy efficiency and increase the production and deployment of renewables, in order to reduce greenhouse gas emissions and meet our Paris Agreement commitments. While an important amount of the investment will come from public funding (at EU,*

[8] Commission Staff Working Document Impact Assessment accompanying the document, inter alia, Proposal for a Regulation of the European Parliament and of the Council on the electricity market (recast) SWD(2016) 410 final (Part 3 of 5)

national or local level), most of it will come from private sources. A stable policy environment is therefore essential, one which encourages and accelerates the necessary public and private investment in innovation and modernisation in all key sectors. The Clean energy for all Europeans package is an important step in this direction – establishing a stable legal framework and a clear direction for the next decade. This greater predictability reduces the risk for investors and provides a clear perspective looking further ahead".[9]

€180 billion per year for a decade equates to €1.8 trillion of investment. This is an extraordinary figure, but the European Commission understand this and have determined that the cost of doing nothing is much greater than the costs of not doing so. Specifically, the European Commission has stated: "*Postponing climate action or rolling back measures is not an option for the European Union. If left unchecked, the unfolding climate crisis will have existential consequences for our natural environment, our health, and our livelihoods way beyond the scale of the current health crisis. The long-term economic disruptions and adverse social consequences resulting from inaction would far outweigh the costs of investing in ambitious climate action today.*"[10]

Further, the European Commission has stated that "*Reaching a 55% emissions reductions target will be a significant investment challenge for EU industry, services, transport, and energy sectors. However, the return on investment from meeting this challenge is nothing less than the ability for EU businesses to compete and our citizens to prosper.*"[11] It is therefore absolutely clear that seeking to avoid the express obligations of the Regulation to reduce costs for consumers is not consistent with the Regulation, nor does it represent an appropriate discharge of the duties of the Regulatory Authorities.

Finally, A key aspect of the 2030 targets is for up to 15% to be delivered via Corporate PPAs (CPPAs). In order to achieve these targets, the cost of entering CPPAs in Ireland must remain broadly competitive with the cost of entering CPPAs across Europe. Corporates give greater weight to the cost of entering Corporate PPAs by comparison with international benchmarks, than they do on the basis of where their major offices might be located.

The price of entering a CPPA is already higher in the Irish market for a number of reasons, not least of which the existing levels of dispatch down. If the price of entering CPPAs becomes prohibitive, as Energia believe is a likely consequence of the RAs proposals in this consultation, it will necessitate that a greater quantity of renewables will require state support (via RESS) in order to be financially viable. A direct consequence of the RAs proposals, is therefore likely to be that investments that might otherwise have been supported by corporate entities, will require state support, funded via the PSO levy paid by end consumers.

We are of the view that a purchase of power under a physical or financial CPPA does constitute 'financial support' and so should be covered by Article 13(7). This is critical

[9] Clean Energy for all Europeans, European Commission, March 2019

[10] Communication COM/2020/562: Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people: https://knowledge4policy.ec.europa.eu/publication/communication-com2020562-stepping-europe%E2%80%99s-2030-climate-ambition-investing-climate_en

[11] ibid

to ensure that corporate PPAs remain a feature of the Irish market. If generators in receipt of corporate PPAs are not compensated at the same rate as generators in receipt of REFIT, RESS or ROCs, generators will all seek RESS rather than CPPAs which completely undermines 15% of Ireland's renewables ambition.

3.4 Impact on Generator Investment

Based on the positions outlined in the Consultation Papers, it is not evident to Energia that the RAs have fully considered the impact of proceeding with their minded to positions on the renewable energy industry and the achievement of long term decarbonisation targets. SEM-21-026 submits that it is clearly not the Regulation's intention to improve the financial situation of units where investments have already been made, but to encourage longer term investment signals for renewables.

If existing generators were forced to take this burden it would significantly alter the investment case for a number of projects either developed or in the process of being developed. It is likewise evident that if enough existing projects experience financial difficulty as a result of the lack of implementation of Article 13(7) requirements, then the risk premia associated with investments in renewable generation technologies in Ireland, is likewise likely to increase.

3.5 Different Remuneration depending on Priority Dispatch Status

SEM-21-026 outlines that under Article 13(7), all units that are currently eligible for priority dispatch would receive compensation for non-market based redispatch. However, if they chose to surrender their priority dispatch rights they would have the opportunity to benefit from the same treatment as new units. In Energia's view this is entirely incompatible with the Regulation. While it is open to the Regulatory Authorities to incentivise generators to give up priority dispatch, they cannot do so by denying priority dispatch generators the level of remuneration to which they are entitled.

The intention of the Regulation is that all generation will be remunerated equally, whether or not they have priority dispatch or whether or not they are subject to market based Redispatch. In developing the Clean Energy Package, the European Commission stated that "*curtailment of generation due to limited transmission and distribution infrastructure would be a measure of last resort and confined to situations in which no market-based responses (including storage and demand response) are available, and subject to transparent rules known in advance to all market actors and adequate financial compensation. All resources would be remunerated in the market on equal terms*"[12] (emphasis added). It is not open to the Regulatory Authorities to intentionally remunerate a generator less favourably that it is entitled (i.e., remunerate it on unequal terms) in order to incentivise the generator to give up priority dispatch.

[12] Commission Staff Working Document Impact Assessment accompanying the document, inter alia, Proposal for a Regulation of the European Parliament and of the Council on the electricity market (recast) SWD(2016) 410 final (Part 1 of 5)

4 Article 13 Redispatch

Energia's prior response outlined the relevance of Articles 13(4) to 13(5) as a means of obtaining a wholistic interpretation of what Article 13 was trying to achieve overall.

The requirement that:

> *transmission system operators and distribution system operators shall report at least annually to the competent regulatory authority, on:*
>
> *a. the level of development and effectiveness of market-based redispatching mechanisms for power generating, energy storage and demand response facilities;*
>
> *b. the reasons, volumes in MWh and type of generation source subject to redispatching;*
>
> *c. the measures taken to reduce the need for the downward redispatching of generating installations using renewable energy sources or high-efficiency cogeneration in the future including investments in digitalisation of the grid infrastructure and in services that increase flexibility.*

Alongside the requirement that:

> *The regulatory authority shall submit the report to ACER and shall publish a summary of the data referred to in points (a), (b) and (c) of the first subparagraph together with recommendations for improvement where necessary.*

These provisions clearly outline the intent to increase understanding of the cause and level of redispatching and to understand what improvements to the system may be necessary, alongside the requirement that where non-market redispatching occurs generators are entitled to be kept financially indifferent.

4.1 Overview of Article 13

Article 13 of the Regulation contains a number of simple principles which, in our view, appear to have been lost in the Consultation Papers. Those principles are:

- Article 13(1) requires that redispatching (which includes constraints and curtailment) shall be based on objective, transparent and non-discriminatory criteria.
- Article 13(2) requires that resources that are redispatched shall be selected based on market-based mechanisms and shall be financially compensated. The payment of compensation for redispatch is not discretionary, it is mandatory.
- Article 13(3) permits non-market-based redispatching to be used in limited circumstances only, namely (a) where no market-based alternative is available; (b) all available market-based resources have been used; (c) the number of available facilities is too low to ensure effective competition; or (d) the grid situation is such that gaming may occur. Non-market based redispatch is permitted in the SEM because no market-based alternative is available and, in the case of locational constraints, the number of available facilities may frequently be too low to ensure effective competition. This is discussed further in Section 4.3, below.

- Article 13(4) imposes certain reporting obligations on the TSO in relation to the effectiveness of market-based redispatching mechanisms and measures taken to reduce the need for the downward redispatching. The CRU must report to ACER and publish the data along with recommendations for improvement.
- Article 13(5) provides that TSOs must guarantee the capability of networks to transmit electricity produced from renewables. Redispatch is limited to the minimum required for system security provided that where the TSO can demonstrate that it is more economically efficient to do so, the system can be planned to permit up to 5% redispatch of renewables where less than 50% of annual gross final consumption of electricity is from renewables.
- Article 13(6) requires that power-generating facilities using renewable energy sources shall only be subject to downward redispatching if no other alternative exists.
- Article 13(7) prescribes the minimum level of compensation that a generator that is subject to non-market based redispatch must receive. In our view this clearly represents the opportunity cost of Redispatch. Otherwise, it may create an incentive for Member States to opt for non-market based Redispatch rather than market based Redispatch to reduce compensation, in clear breach of Article 13(2). This is discussed further in Section 4.5, below.

4.2 General Comments

Energia agrees with the Regulatory Authorities definition of Redispatch as including constraints and curtailment. In the context of the SEM, this understanding has to be correct.

Energia does not agree with the Regulatory Authorities' definition of market-based Redispatch. In particular, Energia does not agree that constraints for non-priority plant can be construed as being compensated on a market based basis if such plants are subject to the BCOP or the BMPCOP. Compensation can only be market based if generators are able to bid a price at which they are prepared to have their generation reduced. If the price used for determining compensation is subject to caps, bidding controls or is otherwise administratively controlled then it is by definition not market based. Again, this is a fundamental principle of the Clean Energy Package.

Energia agrees that the concept of firmness in the SEM equates to the concept of firmness in Article 13(7). Energia is of the view that this has to be correct because the alternative interpretation would result in no generators in the SEM (or indeed in most of Europe) being firm and as a consequence, Article 13(7) would be meaningless. It is not open to a Member State to interpret the Regulation in a way that makes it meaningless.

4.3 Interpretation of Article 13(3)

Energia's understanding is that the RAs are of the view that Article 13(3) ties their hands insofar as it implies that constraints need to be market-based where possible and as a result some form of grandfathering seems to be unavoidable. We further understand that the CRU has advised WEI that if the industry can come up with a legitimate argument, which is compliant with Article 13, as to why constraints should be pro rata / non-market based in future then they would definitely consider it.

Article 13(3) provides that:

> *"3. Non-market-based redispatching of generation, energy storage and demand response may only be used where:*
>
> *(a) no market-based alternative is available;*
>
> *(b) all available market-based resources have been used;*
>
> *(c) the number of available power generating, energy storage or demand response facilities is too low to ensure effective competition in the area where suitable facilities for the provision of the service are located; or*
>
> *(d) the current grid situation leads to congestion in such a regular and predictable way that market-based redispatching would lead to regular strategic bidding which would increase the level of internal congestion and the Member State 8concerned either has adopted an action plan to address this congestion or ensures that minimum available capacity for cross-zonal trade is in accordance with Article 16(8*)."

As is noted above, for so long as generators are subject to the BCOP or BMPCOP, they are in Energia's view (by definition) not subject to market-based compensation. There should therefore be no distinction between priority and non-priority plants and both should be compensated in precisely the same way. In this case Article 13(3)(b) would not apply.

4.4 Interpretation of Article 13(5)

Response: p36 of the Consultation Paper states: "*EirGrid and SONI agree with the assertion of the RAs that the level of compensation as outlined is unjustified. They also question whether the connection offers made to date, combined with previous SEMC decisions on "curtailment", are in fact a guarantee of delivery, based on the combination of the commercial terms of a connection agreement combined with the central dispatch arrangements in the SEM. In addition, given Article 13 is explicitly linked to 50% RES-E with less than 5% constraints, it is not clear to what extent compensation for levels of RES-E in excess of this figure by 2030 is applicable*."

In Energia's view this comment appears to misunderstand Article 13(5)(a). Article 13(5)(a) states that: "*Subject to requirements relating to the maintenance of the reliability and safety of the grid, based on transparent and non-discriminatory criteria established by the regulatory authorities, transmission system operators and distribution system operators shall:….guarantee the capability of transmission networks and distribution networks to transmit electricity produced from renewable energy sources or high-efficiency cogeneration with minimum possible redispatching, which shall not prevent network planning from taking into account limited redispatching where the transmission system operator or distribution system operator is able to demonstrate in a transparent way that doing so is more economically efficient and does not exceed 5% of the annual generated electricity in installations which use renewable energy sources and which are directly connected to their respective grid, unless otherwise provided by a Member State in which electricity from power-generating facilities using renewable energy sources or high-efficiency cogeneration represents more than 50% of the annual gross final consumption of electricity;*"

Article 13(5)(a) is, in our view, not about compensation. Rather, it is about the circumstances in which Redispatch is permitted at all. Our reading of this is that:

(a) TSOs and DSOs must guarantee the capability of transmission networks and distribution networks to transmit electricity (but may Redispatch up to 5% if the TSOs have demonstrated that it is more economically efficient to do so). We are not aware of the Regulatory Authorities having determined that this is the case.

(b) Where renewable energy sources or high-efficiency cogeneration represents less than 50% of the annual gross final consumption of electricity (as is currently the case in the SEM), TSOs and DSOs must guarantee the capability of transmission networks and distribution networks to transmit electricity (but may depart from the 5% redispatch limit if permitted by the Member State).

4.5 Article 13 (7)

The following section outlines the legal interpretation of Article 13(7) which Energia contends is the only interpretation that is consistent with the requirements and objectives of the Article, the Regulation and the wider framework of the CEP and Energy Union, and is applicable to all non-market-based redispatch (constraint and curtailment).

Article 13(7) provides as follows:

"*Where non-market based redispatching is used, it shall be subject to financial compensation by the system operator requesting the redispatching to the operator of the redispatched generation, energy storage or demand response facility except in the case of producers that have accepted a connection agreement under which there is no guarantee of firm delivery of energy. Such financial compensation shall be at least equal to the higher of the following elements or a combination of both if applying only the higher would lead to an unjustifiably low or an unjustifiably high compensation:*

(a) additional operating cost caused by the redispatching, such as additional fuel costs in the case of upward redispatching, or backup heat provision in the case of downward redispatching of power-generating facilities using high-efficiency cogeneration;

(b) net revenues from the sale of electricity on the day-ahead market that the power-generating, energy storage or demand response facility would have generated without the redispatching request; where financial support is granted to power-generating, energy storage or demand response facilities based on the electricity volume generated or consumed, financial support that would have been received without the redispatching request shall be deemed to be part of the net revenues."

Giving the words of Article 13(7) their ordinary meaning, the System Operator is obliged to financially compensate producers in the event of non-market based redispatch. The second sentence provides how financial compensation shall be calculated, being the higher of limb (a) or limb (b), or if the higher of (a) or (b) is unjustifiably low or unjustifiably high, a combination of limb (a) and limb (b).

4.5.1 Meaning of unjustifiably high or low

The reference in Article 13(7) to "unjustifiably low" or "unjustifiably high" pertains solely to the "compensation" that is required to be paid by the Article. The "compensation" to which this refers is the compensation to be paid by the System Operator to the

generator to compensate it for the cost (in the case of limb (a)) or opportunity cost (in the case of limb (b)) of the redispatching.

The reference to "unjustifiably low" or "unjustifiably high" is therefore a test of whether the generator is overcompensated or undercompensated, not whether the compensation to which the generator is lawfully entitled is, or is not, an unjustifiable burden on anyone else (such as the consumer). In order to determine whether the generator is overcompensated or undercompensated, one must look to:

> "net revenues from the sale of electricity on the day-ahead market that the…..facility would have generated without the redispatching request".

If the compensation equals what would have been received, then the generator has been appropriately compensated for its opportunity cost and has not been overcompensated or undercompensated.

4.5.2 RA interpretation of unjustifiably high or low

SEM-21-026 refers (at page 37) to Recital 2 of the Regulation which notes that an aim of the Energy Union is to provide final customers with safe, secure, sustainable, competitive and affordable energy. While it is clear that there is a need to have regard to consumer protection, this does not provide the RAs with any discretion to depart from the express terms of the Regulation, and in particular the provisions with regard to financial compensation under Article 13(7). In fact, Article 13(7) was drafted with those aims in mind and to depart from the plain meaning of the Regulation in this way is counterintuitive to the aims set out in Recital 2 of the Regulation.

The overall cost to consumers is not referred to in Article 13(7), nor are any of the other matters to which the RAs have had regard. It is therefore clear that "unjustifiably low" or "unjustifiably high" do not and could not pertain the to a burden on consumers; and any considerations in relation to the characteristics of the SEM or the financial support are irrelevant considerations, and it is unlawful to have regard to them.

The compensation must therefore be available irrespective of the nature of the financial support (whether ROCs, REFIT, r RESS or CPPAs). Furthermore, the suggestion that "unjustifiably low" or "unjustifiably high" could be intended to pertain to a burden on consumers clearly makes no sense in circumstances where an additional financial burden on consumers could, by definition, never be unjustifiably low. The interpretation of the RAs is therefore not sustainable on the face of the Regulation.

4.5.3 Operating costs 13(7)(a) and net revenues 13(7)(b)

Article 13(7) requires that where a generator is redispatched up, it is compensated for the cost of such upward redispatch in the form of incremental costs. Where a generator is redispatched down, it must be compensated for the opportunity cost of such downward redispatch the form of foregone net revenues (including renewable supports) or, where higher, incremental costs of such downward redispatch (for example in a high efficiency CHP plant the need to replace a heat load). Depending on the generator type, the interplay between the operating costs outlined in 13(7)(a) and the net revenues described in 13(7)(b), would likely result in a wide variety of compensation amounts were it not for the stipulation of compensation being at least:

> *"equal to the higher of the following elements or a combination of both if applying only the higher would lead to an unjustifiably low or an unjustifiably high compensation"*

Inclusion of this stipulation ensures that a mechanism exists such that all generator types can be compensated to the level of being financially indifferent to being redispatched. This stipulation within Article 13(7) therefore contains a methodology for calculating the minimum level of this level of compensation, allowing that it can be higher but can never be lower than the level calculated in accordance with the Article.

Article 13(7) therefore does not create a cap on compensation, it only creates a floor. Article 13(7) also contains a saving provision that ensures that if the application of the methodology results in a generator being overcompensated or undercompensated (in each case unjustifiably), the Member State may adopt a methodology for calculating the level of compensation that involves a 'combination' of the two limbs.

As such it is not open to the RAs to simply ignore the minimum compensation requirements in any circumstance – it must apply a combination of (a) and (b). For example, if a biomass plant is dispatched down and was compensation for its full foregone revenue (including renewable supports) it would be overcompensated because it would be recovering more than it would have recovered had it generated (since it has saved its fuel cost by not generating). In this case, Member States are permitted to compensate such a generator using a combination of (a) and (b) to deduct the avoided fuel cost from the lost revenues. Conversely, compensating a plant using only the higher of limbs (a) and (b) may undercompensate a generator, for example where a HE-CHP plant is dispatched down in may lose energy revenues and also incur costs associated with replacement heat. In this case compensating on the higher of limbs (a) and (b) would undercompensate the generator and the Member State must compensate using a combination of both.

In the case of zero marginal cost generation, the higher of limbs (a) and (b) would always be limb (b) and therefore this must be the measure of compensation for such generators. It is not open to the Regulatory Authorities to depart from this.

4.5.4 Purposive Interpretation of Article 13(7)

The literal interpretation of Article 13(7) is also consistent with the overall purpose and objectives of the Regulation. The Recitals emphasise the importance of flexibility, decarbonisation, innovation and the development of renewable energy .

Recital 23 provides that*:*

> *"While decarbonisation of the electricity sector, with energy from renewable sources becoming a major part of the market, is one of the goals of the Energy Union, it is crucial that the market removes existing barriers to cross-border trade and encourages investments into supporting infrastructure, for example, more flexible generation, interconnection, demand response and energy storage".*

Similarly, Recital 34 provides that:

> *"The management of congestion problems should provide correct economic signals to transmission system operators and market participants and should be based on market mechanisms."*

Article 13(7) sends a clear market signal encouraging investment into supporting infrastructure to minimise redispatch, such as curtailment, including more flexible generation, interconnection, demand response and energy storage. This objective is substantially undermined if Member States were permitted to ignore the requirements

of Article 13(7) and make generators bear the cost of curtailment, rather than the System Operator, simply because the price signal was greatest. When the overall cost of redispatch is greatest, it is more important that Article 13(7) be strictly implemented.

As per our comments in section 2, the appropriate allocation of risk and TSO incentives to minimise constraints and curtailment is the cornerstone of what Articles 12 and 13 are trying to achieve overall. Curtailment is outside of the control of generators. The purpose of financially compensating generators in this way is to ensure that they are indifferent to non-market based redispatch, and in turn promote the development of renewable power-generating facilities. The TSOs, on the other hand, have sight of the cost of compensation as a form of price signal/ opportunity cost for not making the necessary improvements on the network to accommodate greater quantities of asynchronous generation and reduce curtailment. Sight of these costs provides the benefit (reduction in compensation paid to generators) by which the TSOs' can weigh the cost of deploying solutions to increase asynchronous thresholds (reducing curtailment).

4.5.5 Interpretation of Article 13(7) in other Jurisdictions

The approach taken by the RAs to interpret Article 13(7) is markedly at odds with any other interpretation of this Article in any other EU jurisdiction. For example, the Belgian National Regulatory Authority, Commission de Regulation de l'Electricite et du Gaz (CREG) recently interpreted the requirements of Article 13(7) as follows[13]:

> *"Production units which are redispatched downwards are remunerated (compensated according the CEP) for their opportunity costs. This opportunity cost corresponds to the profit they would have made by selling their energy in the day-ahead market coupling, being the difference between the day ahead market clearing price and the variable cost of production or the bid price for being redispatched downwards. This difference is also referred to as the "infra-marginal rent". In contrast, units which are redispatched upwards do not have this opportunity loss since they had not been selected in the day ahead market and hence did not make any profit in that day-ahead market. The upwards redispatching units are only remunerated for the variable cost of production or at bid price."*

In the same study, CREG noted that Article 13(7) clearly indicated that generators that are redispatched should be compensated for loss of profit, stating that [14] :

> *"The compensation of market players (redispatched down) for the loss of profit is clearly indicated here. The interaction of this sound principle with the existence of a zonal price means that market players may be paid for not producing."*

[13] CREG (2019) "*Study on the best forecast of remedial actions to mitigate market distortion"* , paragraph 46. https://www.creg.be/sites/default/files/assets/Publications/Studies/F1987EN.pdf

[14] CREG (2019) "*Study on the best forecast of remedial actions to mitigate market distortion"* , paragraph 29. https://www.creg.be/sites/default/files/assets/Publications/Studies/F1987EN.pdf

Similarly, in a recent report commissioned in October 2019 by the German Federal Ministry for Economic Affairs and Energy on cost or market-based redispatch procurement in Germany, the following was observed at page 13[15]

> *"As part of redispatch, transmission system operators instruct generation facilities and storage facilities to increase or decrease generation in order to change electricity flows in the grid to avoid overloading network elements. Participation in redispatch is mandatory for most generators; generators under 10 MW are excluded so far, in future only small plants under 100 kW will be excluded. Operators are subsequently compensated for costs incurred and lost profits and are thus financially indifferent to redispatch provision. The aim of making operators financially indifferent to redispatch provision is to avoid strategic bidding behaviour and other feedback from congestion management to the electricity market."*

In line with our comments in section 4.5.4, the goal is to ensure that:

a) The renewable generator (operator) is financially indifferent to redispatch provision, and

b) Market based outcomes are not distorted by inappropriate signals created by congestion management (redispatching), owing to the fact renewable generators are financially indifferent.

4.5.6 Legislative history of Article 13(7)

The RAs' view that the overall costs of financial compensation should not be unjustifiably high from the perspective of the consumer is also inconsistent with the early drafts of Regulation 2019/943. The initial concern when drafting the legislation was that the compensation should not be "unjustifiably low". The European Commission's initial proposal for the Article 13(7) simply stated that the financial compensation paid to generators which are the subject of non-market based redispatch should be the higher of 13(7) (a) and (b), referred to in our response as limb (a) and limb (b) .

As the draft Regulation progressed through the ordinary legislative procedure, the wording of Article 13(7) was amended. In November 2017, one of the drafts considered by the Council introduced the following proposal:

> *"Financial compensation shall at least be equal to the highest of the following elements or a combination of them if applying one of the elements would lead to an unjustifiably low compensation:…"* .

The focus of this amendment was to very clearly ensure that generators were not undercompensated; consistent with the language regarding the financial compensation being at least the equal of the higher of the two limbs. The fact that the concern was with generators being under compensated, rather than overcompensated clearly reveals that there was no concern regarding burden on consumers.

On 6 December 2017, a further amendment was proposed as follows:

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[15] NEON (2019) *Cost- or market-based? Future redispatch procurement in Germany,* final report of the project "Beschaffung von Redispatch" commissioned by the German Federal Ministry for Economic Affairs and Energy, p13

> *"Financial compensation at least be equal to the highest of the following elements or a combination of them if applying one of the elements would lead to an unjustifiably low or unjustifiably high compensation".*

Given that it is clear that burden on consumers was irrelevant to this Article prior to the 6 December 2017 amendment, it is equally clear that it remains irrelevant to this Article following the 6 December 2017 amendment. The subject matter of the Article does not change as a result of the introduction of a control on overcompensation as well as under compensation.

In Energia's view, the only possible way that this can be interpreted is that generators should not receive financial compensation that is unjustifiably low or unjustifiably high. In other words, a generator should be in the same position that it would have been in but for the fact that it was curtailed, consistent with the German Federal Ministry for Economic Affairs and Energy position of leaving the generator *"financially indifferent".*

The introduction of the concept of "unjustifiably low" financial compensation in the first instance demonstrates that the primary concern was that, even if the higher of limb (a) or (b) was applied, generators that are curtailed should not be left in a worse position than the position that they would have been in if they were not curtailed. By the same measure, generators should not be overcompensated, or left in a better position as a result of being curtailed (for example, making a saving on variable costs such as fuel).

4.6 Summary of response in relation to Article 13(7)

The RAs have erred in law and have introduced an irrelevant consideration into their assessment of non-market-based compensation for curtailment in SEM. Furthermore, this interpretation is inconsistent with the wider objectives and requirements of the Regulation and of the broader CEP framework.

Having clearly set out the appropriate level of compensation for non-market-based redispatch in SEM and that this level is not "unjustifiably high", the RAs have sought to introduce a further test within Article 13(7) relating to the volume of non-market-based redispatch. Not only does that test not exist, the implication is it would reduce the level of compensation payable to a generator for non-market-based redispatch to below the level of compensation specified in the Regulation and considered appropriate by the RAs. Furthermore, it is inconsistent with and would frustrate the intention of the Article and wider provisions of the Regulation.

If the level of compensation is prescribed, as it is in Article 13(7), and it is not considered by the RAs to be "unjustifiably high" but the RAs regard the overall cost to be "unjustifiably high", it indicates that the RAs' issue is with the volume of non-market based redispatching in the SEM. As this is one of the specific issues the Regulation seeks to address, it is entirely wrong and unsustainable for the RAs to persist with this line of argument.

It is therefore firmly our view that RAs interpretation of "unjustifiably high" is wrong and that the analysis and conclusions that follow from it, including the options, are irrelevant and impermissible considerations, with the intention of frustrating the objectives of the Regulation. Energia notes further that the RAs' interpretation of unjustifiably high, alongside being incorrect, belies a lack of objectivity in their analysis of Article 13(7). Such an interpretation is the only means by which the RAs' would seek to achieve their desired outcome, irrespective of whether or not this interpretation is consistent with the intent of the Legislators.

For the avoidance of doubt, it is firmly Energia's view that the redispatch of non-dispatchable renewable generation in SEM is non-market-based. Full financial compensation, as per the agreed interpretation of Article 13(7), should be paid to all affected generators for the volume of energy redispatched by the system operator in the case of curtailment but limited to generators capable of the firm delivery of energy for constraints. It is also necessary that generators receive this compensation and changes will be required to the calculation of the PSO by CRU to account for this.

4.7 TSO view in relation to Compensation

Based on page 36 of SEM-21-026, Energia's understanding is that the TSO's view is that compensation should only reflect a genuine loss to the generator by reference to a market position that is feasible from the point of view of both the generator and the total system (i.e. reflecting an ex ante position that takes into account SNSP limits). Given that Article 13(7)(b) refers to "net revenues from the sale of electricity on the day-ahead market that the power-generating, energy storage or demand response facility would have generated without the redispatching request" we have some sympathy for the view that the generator must have a day ahead position in order to be compensated at the day ahead price. However, we do not believe that SNSP limits have any relevance. By definition, if curtailment constitutes Redispatch (and we agree that it is) then SNSP limits cannot be taken into account in determining whether compensation is payable under Article 13(7).

Page 36 of the Consultation Paper reads as follows:

> "*EirGrid and SONI agree with the assertion of the RAs that the level of compensation as outlined is unjustified. They also question whether the connection offers made to date, combined with previous SEMC decisions on "curtailment", are in fact a guarantee of delivery, based on the combination of the commercial terms of a connection agreement combined with the central dispatch arrangements in the SEM. In addition, given Article 13 is explicitly linked to 50% RES-E with less than 5% constraints, it is not clear to what extent compensation for levels of RES-E in excess of this figure by 2030 is applicable."*

This comment appears to misunderstand Article 13(5)(a). Article 13(5)(a) states that:

> *"Subject to requirements relating to the maintenance of the reliability and safety of the grid, based on transparent and non-discriminatory criteria established by the regulatory authorities, transmission system operators and distribution system operators shall:….guarantee the capability of transmission networks and distribution networks to transmit electricity produced from renewable energy sources or high-efficiency cogeneration with minimum possible redispatching, which shall not prevent network planning from taking into account limited redispatching where the transmission system operator or distribution system operator is able to demonstrate in a transparent way that doing so is more economically efficient and does not exceed 5% of the annual generated electricity in installations which use renewable energy sources and which are directly connected to their respective grid, unless otherwise provided by a Member State in which electricity from power generating facilities using renewable energy sources or high-efficiency cogeneration represents more than 50% of the annual gross final consumption of electricity;"*

Article 13(5)(a) is, in our view, not about compensation. Rather, it is about the circumstances in which Redispatch is permitted at all. Energia's interpretation is thus that:

(a) TSOs and DSOs must guarantee the capability of transmission networks and distribution networks to transmit electricity (but may Redispatch up to 5% if it is more economically efficient to do so); and

(b) Where renewable energy sources or high-efficiency cogeneration represents less than 50% of the annual gross final consumption of electricity, TSOs and DSOs must guarantee the capability of transmission networks and distribution networks to transmit electricity (but may depart from the 5% redispatch limit if permitted by the Member State).

5 Article 12 Dispatch

Under Article 12, new renewable generators which are not eligible to obtain priority dispatch would become responsible for submitting Commercial and Technical Offer Data (COD and TOD) and respond to dispatch instructions from the system operator. Importantly, under Article 12 there is also provision for the priority dispatch status of renewable generation to be amended, should a generator wish to opt-out of priority dispatch. Facilitating this will be important over the coming years as two increasingly large categories of renewable generators begin to emerge - out-of-support units who now rely solely on market revenues and generators availing of new support schemes such as the Renewable Electricity Support Scheme (RESS).

Both categories of generators are unlikely to want to be dispatched on the system during times of negative pricing and would be unwilling to accept prices below €0/MWh. The market systems will need to be equipped to accommodate units which choose to opt out of priority dispatch in order to allow them to submit COD and TOD and participate in the market.

As per our comments in section 4.2, Energia (alongside WEI) disagrees with the RAs interpretation that constraints as applied to all non-priority dispatch units is a form of market based redispatch. It is our strong position that constraint of renewable generation which occurs on the power system is a form of non-market based redispatch and therefore should be fully compensated up to the value of the unit's financial support.

Furthermore, we share WEI's view that any form of action on non-dispatchable units with priority dispatch (i.e., wind and solar units) are forms of redispatch only, and that dispatchable units with priority dispatch (i.e., CHP, hydro and waste-to-energy) can have actions which are forms of dispatch and actions which are forms of redispatch.

5.1 Technical challenges

Non-priority dispatch renewables which submit COD and TOD will need to be able to respond to dispatch instructions from the system operator. At present, the system operators dispatch wind generation (and solar generation) in a limited form through the application of constraint and curtailment instructions using the Wind Dispatch Tool.

Conventional generators are currently dispatched by the system operators using EDIL. Energia, alongside WEI members has very serious concerns over the

application of EDIL as a dispatch mechanism for non-priority dispatch variable generators. Due to its extremely manual nature and the fact that wind units do not use EDIL at all at present, the use of EDIL would cause very significant disruption to market participants and require significant costs to install and train staff on this system. The use of EDIL would require manual entry of wind and solar units' availability on a very regular basis and add a significant workload to the National Control Centre engineers in EirGrid and SONI who would need to manually accept each new availability declaration from wind and solar units.

In comparison, the use of the Wind Dispatch Tool, which is already a well-functioning dispatch mechanism, will erode the need for manual entry of availability from renewable units as this is automatic. It would also allow for automatic response from renewable units within seconds, as opposed to a manual acceptance of a dispatch instruction through EDIL. Energia recognises however that there is no process currently for the Wind Dispatch Tool to accept FPNs which is a key requirement for renewables seeking to avoid running below acceptable prices. Amending the Wind Dispatch Tool or allowing for a purpose built suitable alternative system to be developed, would be Energia's suggestion of how to allow for this to happen. We note from the TSO workshop of 1 July 2021 that it is proposed to find a solution through development of the use of the Wind Dispatch Tool (or Energy Dispatch Tool), Energia looks forward to further updates in relation to the feasibility of such a proposal. Furthermore, there will be times for energy balancing purposes that priority dispatch units will be required to be dispatched down after all market-based resources have been utilised. To ensure fair and even burden sharing this should continue to be applied on a pro-rata basis among the priority dispatch units, using the hierarchies proposed.

In considering the interactions between Article 12 and Article 13, Energia believes that facilitating the access of non-priority dispatch units to become price makers in I-SEM, will mean those units choose to run less frequently at times of negative pricing or at times where priority dispatch generation is very high and there is no "space" remaining following energy balancing. The reduction of renewable generation at such times, would lessen the requirement for redispatching units in the balancing market, thus reducing the impact on the end consumer and having a direct impact to any resulting compensation for dispatch down.

The meaning of the FPN for controllable non-priority dispatch renewables should also be a matter of consideration. Under Article 6 (1), Balancing Market design should allow for non-discrimination between different market participant types, "taking account of…the different technical capabilities of generation sources". Forcing wind units to submit FPNs on a like-for-like basis with conventional technical characteristics does not meet this high-level requirement of the Regulation. For example, an FPN from a non-priority dispatch controllable renewable generator may have the meaning "I wish to run at my available power based on the renewable resource", rather than a declaration of "I wish to run the following minute-by-minute forecast of my available wind output". Non-priority dispatch units which are obligated to submit both COD and TOD, should have the right to choose whether to submit simple or complex commercial offer data and being settled for redispatch from their PNs in the same way as any other unit, noting that the PNs may have a different technical form to conventional generation to respect the technical characteristics of the generator pursuant to the non-discrimination required under Article 6 (1).

The introduction of such a category of unit is implicitly required under the Electricity Regulation and should significantly reduce the costs to the system operator, and ultimately the end consumer, of dispatching down renewable units under Article 13. As the majority of non-priority dispatch units will likely choose not to run at times when the market price is negative, this will take a potentially large volume of renewables off the system at such times and reduce the need to redispatch priority dispatching units. Furthermore, as a result of renewable generation which is out of subsidy support being able to price the costs of dispatch down, the need to reduce units which are in receipt of subsidies is further reduced. Consequently, the volumes of compensation paid to such units for non-market based redispatch, as required under Article 13, will decrease.

Energia agree with the WEI position that renewable units no longer availing of priority dispatch be treated as required to submit PNs, commercial and technical offer data and are treated as dispatchable units. Furthermore, there should be no change as regards the timing for submission of PNs. As discussed above there will be circumstances when non-priority dispatch renewables will desire (and must be enabled) to switch off, as per dispatchable units, when they are not dispatched through the ex-ante markets and that constraints remains on a pro–rata basis regardless of dispatch priority for renewable units.

5.1.1 Equal Treatment of All Generators in Scheduling and Dispatch and Balance Responsibility

Further to the broader objective of the Regulation previously discussed, the equal treatment of all but the smallest generation units in the market is a requirement. On this point the consultation paper is clear, non-dispatchable renewable generators that are “in the market” do not participate on an equal basis with dispatchable units today and, are unable to submit TOD or COD and where PN’s are submitted, they are ignored by the TSOs who include their own forecasts of availability for the units. The requirements of this Article will necessitate changes to the central market systems to allow all non-priority dispatch, non-dispatchable, controllable generators to fully participate in the market. Clarity on the changes required and the timing of the changes is urgently required, particularly if the impact of this uncertainty on the upcoming RESS auction is to be avoided. Full market participation also brings with it the challenges of balance responsibility for the generator. The full implementation of Article 13 and the corresponding opportunity or entitlement to access compensation for redispatch is representative of the symbiotic arrangements in the Regulation with respect to market risk and reward.

6 Conclusion

Whilst publication of the Consultation Papers is welcome, we note our concern that this is the third iteration of consultation on the implementation of Articles 12 and 13 and we are mid-way through 2021, with implementation of the Regulation appearing still to be some time away. We would strongly recommend that the Regulatory Authorities, SEMO, and the System Operators place a high priority on the next steps following the Consultations so that Ireland and Northern Ireland become compliant with the Regulation as swiftly as possible.

The EU’s Clean Energy Package is intended to facilitate the achievement of Europe’s 2030 targets and longer-term decarbonisation objectives. Compliance with this

Regulation is a legal requirement throughout Europe and to achieve this, change is inevitable and may come with a cost. The Regulation is clear in its intent, especially when viewed within the context of what is trying to be achieved by the Clean Energy Package. While it is true that SEMC has duties in relation to the discharge of its statutory functions, any such duties are subservient to the provisions of Article 13(7). It is therefore the responsibility of the RAs to strictly implement the requirements of Articles 12 and 13, and to do so as soon as possible.